

RONALD J. TENPAS, Assistant Attorney General  
JEAN E. WILLIAMS, Chief  
LISA L. RUSSELL, Assistant Chief  
RICKEY D. TURNER, JR., Trial Attorney  
CO Bar No. 38353  
U.S. Department of Justice  
Environment and Natural Resources Division  
Wildlife and Marine Resources Section  
Ben Franklin Station, P.O. Box 7369  
Washington, D.C. 20044-7369  
(202) 305-0229 (tel)  
(202) 305-0275 (fax)

## Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY,  
NATURAL RESOURCES DEFENSE COUNCIL,  
and PACIFIC ENVIRONMENT, non-profit  
corporations,

Case No. 3:07-cv-06406-MHP

## Plaintiffs,

## STIPULATED SETTLEMENT AND [PROPOSED] ORDER

V.

**DIRK KEMPTHORNE, Secretary of the Interior  
and U.S. FISH AND WILDLIFE SERVICE,**

#### Defendants.

Plaintiffs, the Center for Biological Diversity, Natural Resources Defense Council, and Pacific Environment, and Defendants, the U.S. Fish and Wildlife Service and Dirk Kempthorne, Secretary of the Interior (“Secretary”), by and through their undersigned counsel, state as follows:

WHEREAS, on April 5, 2004, Plaintiffs submitted a petition to list the yellow-billed loon as “threatened” or “endangered” under the Endangered Species Act (“ESA”).

WHEREAS, on June 6, 2007, the Secretary published a finding under 16 U.S.C. § 1533(b)(3)(A) that the petition presented substantial information that listing may be warranted. 72

1 Fed. Reg. 31,256 (June 6, 2007).

2 WHEREAS, under the ESA, the Service had one year from the date it received the Petition  
3 to make a “12-month finding” that listing the yellow-billed loon as threatened or endangered was  
4 warranted, warranted but precluded, or not warranted. 16 U.S.C. § 1533(b)(3)(B).  
5

6 WHEREAS, the Secretary has not issued a 12-month finding.

7 WHEREAS, on December 19, 2007, Plaintiffs filed a Complaint for declaratory and  
8 injunctive relief, pursuant to the ESA, 16 U.S.C. § 1540(g)(1)(C), and the Administrative Procedure  
9 Act (“APA”), 5 U.S.C. § 706.  
10

11 WHEREAS, Plaintiffs and Defendants, through their authorized representatives, and without  
12 any admission or final adjudication of the issues of fact or law with respect to Plaintiffs’ claims,  
13 have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of  
14 the disputes set forth in Plaintiffs’ Complaint.  
15

16 WHEREAS, Plaintiffs and Defendants agree that settlement of this action in this manner is  
17 in the public interest and is an appropriate way to resolve the dispute between them.  
18

19 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS  
20 FOLLOWS:

21 1. The Service shall submit for publication to the Federal Register a 12-month finding on  
22 Plaintiff’s petition to list the yellow-billed loon by February 15, 2009. After issuance of the 12-  
23 month finding, the Service’s obligations, other than the obligation to pay Plaintiffs’ fees and costs  
24 as described in Paragraph 6, under this agreement shall terminate.  
25

26 2. In consideration of Defendants’ agreement to meet the deadline in paragraph 1, Plaintiffs  
27 agree to dismiss this action. Notwithstanding the dismissal of this action, the parties hereby stipulate  
28 and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of  
the stipulation.  
29

1 this Agreement and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life  
2 Ins. Co. of Am., 511 U.S. 375 (1994).

3       3. Either party may seek to modify the deadline specified in Paragraph 1 for good cause  
4 shown. In that event, or in the event that either party believes that the other party has failed to  
5 comply with any term or condition of this Agreement, the parties shall use the dispute resolution  
6 procedures specified in Paragraph 4.

7       4. The Order entering this Settlement Agreement (“Agreement”) may be modified by the  
8 Court upon good cause shown by written stipulation between the parties, filed with and approved  
9 by the Court, or upon written motion filed by one of the parties and granted by the Court. In the  
10 event that either party seeks to modify the terms of this Agreement, including the deadline specified  
11 in Paragraph 1, or in the event of a dispute arising out of or relating to this Agreement, or in the  
12 event that either party believes that the other party has failed to comply with any term or condition  
13 of this Agreement, the party seeking the modification, raising the dispute, or seeking enforcement  
14 shall provide the other party with written notice of the matter. The parties agree that they will meet  
15 and confer (in-person not required) at the earliest possible time in a good-faith effort to resolve the  
16 matter before seeking relief from the Court. If the parties are unable to resolve the claim within a  
17 reasonable time, either party may seek relief from the Court.

18       5. No party shall use this Agreement or the terms herein as evidence of what does or does  
19 not constitute a reasonable time line for issuing a 12-month finding under 16 U.S.C. § 1533(b)(3)(B)  
20 in any other proceeding regarding the Service’s implementation of the ESA.

21       6. Defendants agree that Plaintiffs are the “prevailing party” in this action, and agrees to pay  
22 Plaintiffs reasonable attorneys’ fees and costs, pursuant to Section 11(g) of the ESA, 16 U.S.C. §  
23 1540 (g). Therefore, Defendants agree to settle all of Plaintiffs’ claims for costs and attorneys’ fees  
24

1 in the above-captioned litigation for a total of \$6,410.18. The check will be made payable in the  
2 amount of \$6,410.18 to Plaintiffs' undersigned counsel, Andrea Treece of the Center for Biological  
3 Diversity.  
4

5       7. Defendant agrees to submit all necessary paperwork to the Department of the Treasury's  
6 Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10) business days of receipt  
7 of the signed court order approving this stipulation.

8       8. Plaintiffs agree to accept payment of \$6,410.18 in full satisfaction of any and all claims  
9 for attorneys' fees and costs of litigation to which Plaintiffs are entitled in the above-captioned  
10 litigation, through and including the date of this agreement. Plaintiffs agree that receipt of this  
11 payment from Defendant shall operate as a release of Plaintiffs' claims for attorneys' fees and costs  
12 in this matter, through and including the date of this agreement.  
13

14       9. The parties agree that Plaintiffs reserve the right to seek additional fees and costs incurred  
15 subsequent to this agreement arising from a need to enforce or defend against efforts to modify the  
16 underlying schedule outlined in Paragraph 1, or for any other unforeseen continuation of this action.  
17

18       10. No provision of this Agreement shall be interpreted as, or constitute, a commitment or  
19 requirement that Defendants take action in contravention of the Endangered Species Act, the  
20 Administrative Procedure Act, or any other law or regulation, either substantive or procedural.  
21 Nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded  
22 to the Service by the ESA, the APA, or general principles of administrative law with respect to the  
23 procedures to be followed in making any determination required herein, or as to the substance of any  
24 final determination.  
25

26       11. No provision of this Agreement shall be interpreted as, or constitute, a commitment or  
27 requirement that Defendants are obligated to spend funds in violation of the Anti-Deficiency Act,  
28

31 U.S.C. § 1341. Plaintiffs assert that this Agreement does not create a conflict with the Anti-Deficiency Act because the duty to make petition findings is required in non-discretionary terms by the ESA and because the Anti-Deficiency Act would not excuse compliance with a pre-existing court-approved Agreement. Plaintiffs intend to assert this position if the Service fails to comply with the terms of this Agreement for reasons of insufficient appropriations. Defendants reserve all legal and equitable defenses to such a claim.

12. The parties agree that this Settlement Agreement was negotiated in good faith and it constitutes a settlement of claims that were vigorously contested, denied, and disputed by the parties. By entering into this Agreement the parties do not waive any claim or defense.

13. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to the Court's entry of the terms and conditions of this Agreement and do hereby agree to the terms herein.

14. The terms of this Agreement shall become effective upon entry of an order by the Court ratifying the Agreement and upon approval of this Agreement by the Court, all counts of Plaintiffs' Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1).

Respectfully submitted this ## day of April 2008 ,  
RONALD J. TENPAS, Assistant Attorney General  
JEAN E. WILLIAMS, Section Chief  
LISA L. RUSSELL, Assistant Section Chief

/s/  
RICKEY DOYLE TURNER JR.  
U.S. Department of Justice  
Environment & Natural Resources Division  
Wildlife and Marine Resources Section  
P.O. Box. 7369  
Washington, D.C. 20044-7369  
(202) 305-0229  
[rickey.turner@usdoj.gov](mailto:rickey.turner@usdoj.gov)

1  
2 Attorneys for Defendants  
3

4 /s/  
5

6 ANDREA A. TREECE (CA Bar No. 237639)  
7 CENTER FOR BIOLOGICAL DIVERSITY  
8 1095 Market St., Suite 511  
9 San Francisco, CA 94103  
10 Telephone: (415) 436-9682 x 306  
11 Facsimile: (415) 436-9683  
12 Email: atreece@biologicaldiversity.org

13  
14 Attorneys for Plaintiffs  
15

16  
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18  
19  
20 **ORDER**  
21  
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23 The terms and conditions of this Stipulated Settlement Agreement are hereby adopted as  
24 an ORDER of this Court, and this matter is hereby DISMISSED with prejudice.  
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27 Dated: this \_\_\_\_\_ day of \_\_\_\_\_, 2008.  
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32 United States District Court Judge  
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